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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 457.

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of Walker & Daly,
Petitioners,

against

ROBERT CAIN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

MELVILLE J. FRANCE,
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Of Counsel.

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Statement.

The petitioners, defendants below, seek a review by this Court of a determination of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York in favor of respondent entered upon a verdict after trial before Honorable Julian W. Mack, Circuit Judge, and a jury.

Numerical references in this brief indicate pages and folios of the printed record unless otherwise stated.

Nature of Case and Outline of Facts.

Respondent, plaintiff below, at about 1 o'clock in the morning of February 6, 1927, while employed by petitioners as a fireman on their oil tanker *Alpha*, was struck twice by his superior officer, one Jackson, the second assistant engineer, with a monkey wrench, as a result of which assault respondent has permanently lost the vision of his left eye (pp. 46-7, 51-2, 125, 143; fols. 137-9, 157, 374-5, 428). The assault was committed upon the deck of the vessel which was then lying in the harbor of Amuey, Venezuela, preparing to clear for her return voyage (pp. 63, 342, 345, 347; fols. 187, 1026, 1034-8, 1041).

Jackson, at the time of the assault, was in charge and command of the engine room and fire room and of the engine room personnel (pp. 274, 280, 287, 289; fols. 820-3, 840, 859-61, 866-7). The plaintiff was assigned to the twelve to four watch and it was, of course, likewise his period of duty (pp. 280, 315; fols. 840, 943-4).

Jackson committed the assault not in any private quarrel (pp. 294, 315, 319; fols. 881, 944, 956-7), but while acting in the course of his employment—at least the jury and the courts below have so determined. The minor question raised by the petitioners' objection to that determination (Petition, p. 3, Respondent's Brief, p. 10, Point C, pp. 22-4) will presently require some reference to the basic characteristics of the rule *respondeat superior* and a slightly more detailed examination of the evidence (Point III, *post*).

We venture to restate as follows the questions raised by this application for a discretionary review of the judgment at bar based upon this assault:

Questions Presented.

1. May a seaman assaulted on shipboard by an officer acting within the scope of the officer's employment invoke the rule *respondeat superior* in an action against the common employer to recover damages for the assault?

2. Does the Corporal Punishment Statute, U. S. Code, Title 46, Section 712, preclude the assaulted seaman from recovering from the employer?

3. Is there evidence in the record at bar presenting the question of fact as to whether the petitioners' employee who committed the assault was engaged about the master's business and within the scope of his employment?

The first of the questions above outlined is in material substance the same as petitioners' question 1 (Petition, p. 2). The petitioners' statement of the question, however, appears to us inaccurate. One who resorts to the rule *respondeat superior* is, of course, not relying upon the employing shipowner's violation of any duty to protect. He is not relying upon a breach by the employer of any of the duties imposed specially upon the employer. He is relying upon an obligation springing from the fault of another, a subordinate of the employer, for whose actions, however, the law holds the employer civilly answerable.

Nor does the fact that the assault is committed in anger possess any determining materiality. An assault committed without anger, as for the purpose of robbery, would certainly not invoke the rule *respondeat superior,* while an assault committed in anger, as most assaults are, may nevertheless be done in furtherance of the employer's business, *i. e.*, for the purpose of getting the results which it is

the duty of the offending employee (although by proper methods) to obtain. (*Jebeles-Colias, etc. Co.* v. *Booze*, 181 Ala. 456, 459-60.)

Questions 2 and 3 above outlined are, generally speaking, the equivalents of petitioners' questions 2 and 3 (Petition, p. 3).

For the reasons set forth in the following points, it is submitted that none of the questions urged is either novel or doubtful; that in fact the law is clear as to each and that the decision below is so manifestly in accord with sound principles and precedents that no further review is required.

POINT I.

The civil responsibility of the petitioners for the assault committed by their employee, Jackson, while acting in the course of his employment, is settled by authority and is founded upon unassailable principles. The contention that such responsibility is barred by some surviving vestige of the fellow servant rule or by a narrow exception to the rule respondeat superior is sheer special pleading, unsupported by authority and utterly devoid of intrinsic merit.

A.

The principle *respondeat superior* is of universal application and is a part of the law maritime as well as of the common law.

There is, of course, nothing in the law maritime as distinguished from the common law, or in maritime relations as distinguished from others, which precludes the operation of the rule *respondeat superior*. The operation of that rule

is seen in the responsibility of water carriers for the acts of their representatives, which is broadly parallel to the like responsibility of land carriers. It is likewise manifest in the general responsibility of operators of ships for the torts committed by their employes to whom the actual functions of operation are entrusted.

But it is suggested that the right of a seaman to maintenance and cure precludes him from relying on the rule *respondeat superior.* Why? The right to maintenance and cure is an incident of the employment, derived in the first instance from necessity and interest as well as from considerations more humane—a sailor who is hurt or sick at sea or in a foreign port obviously cannot be put off the ship or allowed to starve on the ship. What is there about this right which excludes the seaman from the operation of other rules of law which are available to others both at sea and on shore? In what possible way does the right to maintenance and cure conflict with the right to indemnity for injuries? No such conflict has been encountered in according the seaman redress for conditions amounting to unseaworthiness, or for injuries due to negligence—now that the fellow servant rule has been swept away by statute. None apparently is found if he is assaulted by his captain (Petitioners' Brief, p. 157), but if it so happens that the assault is committed by some other officer, the suggestion is that the seaman's right under maritime law to maintenance and cure excludes the right to receive compensatory damages, which could otherwise be exacted through the rule *respondeat superior,* and constitutes everything to which he can be entitled. No reason for this eccentric exception to the operation of the rule *respondeat superior* is suggested, and the argument that any obstacle to the operation of that principle of responsibility is found in the law of

maintenance and cure is without the countenance of a single decision.

It is said, however, that the expressions of this court in the case of *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 380, indicate that a seaman has no right to sue his employer for assault committed by a superior officer in the course of the officer's employment. That expression falls far short of laying it down that the rule *respondeat superior* is subject to the exception which is now urged. The case was a negligence case. It arose before the Merchant Marine Act of 1920, and the expression referred to related to the controversy as to the construction of the prior enactment, the LaFollette Act of 1915, in particular the provision: "Seamen having command shall not be held to be fellow servants with those under their authority." The plaintiff contended that that act eliminated the fellow servant rule and so entitled the plaintiff to recover. The defendant argued that the scope of the provision in the LaFollette Act was much narrower; that it really intended merely to state that masters of vessels were not fellow servants of seamen. The Court adopted the latter and stricter construction, holding that:

> "The language of the section discloses no intention to impose upon ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore."

Even so, the case was close; three justices dissented and Mr. Justice Holmes concurred in result only. Moreover, the *Chelentis* case has virtually been superseded by the enactment of the Merchant Marine Act of 1920, and by the decision of this Court in *Panama R. R. Co.* v. *Johnson*,

264 U. S. 375, 389, in which this Court interpreted the later statute and held that it did contemplate introducing into cases of personal injuries to seamen arising under the maritime law the obligations and liabilities, the rights and rules which had not been invoked by the LaFollette Act.

The Osceola, 189 U. S. 158, which is much relied on by the petitioners, is a strong authority against their contention. The remark to which counsel calls attention (Petitioners' brief, pp. 11-12), is as follows (italics ours):

> "* * * None such is given in the admiralty court jurisdiction act of 1861, although it seems an action in admiralty will lie against the master *in personam* for an assault committed *upon a passenger or seaman.*"

If this remark is to sustain the inference that this Court ruled that no action could be brought by a seaman against the employing owner for assault committed by an officer, it obviously has a like implication as to an assault upon a passenger.

Yet it is certain that the petitioners' counsel will not claim that an assault committed by a ship's officer in the course of his employment upon a passenger would not justify an action against the ship-owner as employer of the offending employee. Moreover, if this Court had intended to hold that all actions brought by an employee for an assault made upon him by a superior were barred, the Court, it would seem, would have said just that. Instead the Court limited its pronouncement to negligence actions. In all its reasoning, and in formally stating its conclusions, the Court invariably limited its statement of the cases in which the injured seaman could not recover to instances of injury through negligence.

Finally, even in denying to seamen the right to indemnity in the case of an injury due to negligence the Court in the *Osceola* opinion relied not on any principle peculiar to admiralty law but on the fellow servant rule of the common law—we find no statement that the principle *respondeat superior* does not apply in such a case but instead the adoption of a common law exception to the operation of that principle. It is clear, therefore, that there is no principle of maritime law—either general or specially limited to defeat a seaman's claim—which precludes the operation of *respondeat superior.*

B.

The second reason advanced for the claim of immunity is the contention that the fellow servant rule applies not only to negligence cases but to those of wilful assaults as well. This contention is negatived by a weight of authority federal and state, common law and maritime, so overwhelming as to constitute a virtual unanimity. Not only is the fellow servant rule invariably stated as applying to negligence cases only but it is restricted to such cases and is not an obstacle to recovery in an action against the employer brought by an employee injured not inadvertently but by the wilful act of his superior.

Wolfe vs. *Thomas,* 268 Fed. 464, 467;
Memphis & N. Packet Co. vs. *Hill,* 122 Fed. 246;
The General Rucker, 35 Fed. 152;
The Vueltabajo, 163 Fed. 594;
Gabrielson vs. *Waydell,* 67 Fed. 342;
Richard vs. *Amoskeag Mfg. Co.,* 109 Atl. 88 (N. H.) s. c. 8 A. L. R. 1426;
Palos Coal & Coke Co. vs. *Benson,* 145 Ala. 664, 39 So. 727;

Panama Ry. Co. v. *Johnson,* 264 U. S. 375;
Avondale Mills vs. *Bryant,* 10 Ala. App. 507, 63 So. 932;
Jebeles-Colias Confectionery Co. vs. *Booze,* 181 Ala. 456, 62 So. 12;
Tillar vs. *Reynolds,* 96 Ark. 358; 131 S. W. 969; 30 L. R. A., N. S. 1043;
Roberts vs. *Southern R. R. Co.,* 143 N. C. 176, 55 S. E. 509; 8 L. R. A., N. S. 798;
Fleming vs. *Tarboro Knitting Mills,* 161 N. C. 436, 77 S. E. 309;
Rogahn vs. *Moore Mfg. Co.,* 79 Wis. 573, 48 N. W. 669.

All of the decisions above cited necessarily involve the exclusion of the application of the fellow servant rule from the case of a wilful assault. In the case of *Memphis & N. Packet Co.* vs. *Hill* (*supra*), the defendant urged the fellow servant rule as an objection to the plaintiff's judgment. The Circuit Court of Appeals for the Eighth Circuit expressly held in that case that the fellow servant rule had no application to the case of a wilful assault. The Court in its opinion, Judge Thayer writing, after alluding to the contention that the fellow servant rule was applicable, said (122 Fed. at 247):

> "But this doctrine, we think, has no application to the case in hand. The injuries complained of by libellant were not occasioned by the negligent act of Wright while he and the libellant were working side by side as fellow servants, but they were wilfully and wrongfully inflicted when Wright was acting as an officer of the boat, to wit, as captain of the watch, having been placed in that position of authority by the mate, and by virtue of holding that

> office had the same power to give orders to the deck hands and direct them in what to do as the mate."

But one determination of any court of review applying the fellow servant rule in a case of wilful assault has come to our attention, viz., the case of *Gabrielson* v. *Waydell*, 135 N. Y. 1, now repudiated (*Encarnacion* v. *Jamison*, 251 N. Y. 218) by the court which decided it, and also by petitioners (Petitioners' Brief, p. 15). Even in that now overruled decision the error was inadvertent and without discussion.

Finally if the term "negligence" in the *Osceola* and other decisions stating and applying the fellow servant rule means wilful assault as well, it has a like inclusiveness in the Federal Employers' Liability Act extended to seamen by Section 33 of the Merchant Marine Act of 1920. We believe "negligence" means "negligence" in both places, but if it means wilful act also in the decisions which those statutes were intended to supersede it has a like import in the remedial legislation which employed the same terminology.

Counsel argues (Brief, p. 14) that the propositions laid down in the *Osceola* respecting negligence were intended (by implication) to be "a complete statement of the rights * * * of seamen, * * * for injuries sustained in the navigation of the vessel". Why? The Court does not say so. The Court had in mind the distinction between assault and negligence, for the opinion elsewhere refers, as we have noted, to early cases relating to assault. Yet assault is not included in the formulation of principles. Even counsel does not persist in this contention for although the *Osceola* permits the seaman no recovery for the negligent fault of the Captain (*Osceola* Proposition 4, see Petitioners' Brief, p. 13), counsel concedes that for a wilful assault

by the Captain the seaman could recover from the employer (Petitioners' Brief, p. 15).

The scarcity of early cases (Petitioners' Brief, p. 17) is because the development of the rule *respondeat superior* is recent. The same scarcity is to be noted in the field of actions by third persons against the employer for assaults committed by the employee (26 Cyc., 1527). Professor Wigmore in a series of articles ("Responsibility for tortious acts; its history.") in 7 Harv. Law Rev. 383 *et seq.* notes that in our late medieval and modern jurisprudence there have been three stages, viz.:

(1) The test of the particular command—employer not liable unless he directed the doing of the very act complained of;

(2) The test of the command implied from the general authority;

(3) The test of the scope of employment.

The last of these tests did not come to dominate this field until about 1800, and cases considerably later than that date are found not infrequently which apply the earlier test, *e. g.*:

Mali vs. *Lord*, 39 N. Y. 381.

In that case the defendants, merchants, were held not responsible for the act of their superintendent in causing the unjustified arrest and search of a customer suspected of shoplifting. The reporter's head-note contains the following:

> "While the master is responsible, civilly, for the fraud, negligence, or other wrongful acts of his servant committed in the transaction of his business, he is not responsible for the wilful injury committed by the servant while so engaged, unless he so acted by the express or implied authority of his employer".

As a matter of fact, however, the principle *respondeat superior* appears to have been recognized in the maritime courts as available to a seaman assaulted by a superior even earlier than the period of its general recognition in the common law courts. Thus in the case of *The Ruckers* (4 Rob. Ad. Rep. 60), a passenger libelled the ship for an assault made upon him by the master, *"and as it was conceded that the proceeding would have been upheld if it had been the case of an assault upon a seaman,* it was insisted that a passenger was entitled to the same remedy and it was so held by Sir William Scott" (Dissenting opinion per Maynard, J., in *Gabrielson* v. *Waydell,* 135 N. Y., at 18).

The cases cited on pp. 8-9, *ante,* and on pp. 15-18, *post,* disclose the greater scope of the employer's responsibility according to the view which now prevails.

POINT II.

The Corporal Punishment Act obviously has no bearing upon the case favorable to the petitioners and certainly affords no implication upon which the denial to a seaman of redress for a wilful assault can be predicated.

Petitioners' argument based upon this statute, last amended on March 4, 1915, cannot withstand the most superficial examination. The statute in certain circumstances creates a liability against the owner, captain, etc., irrespective of any question as to the scope of employment. It gives a lien against the vessel. It certainly does not by implication repeal or outlaw any right that existed on March 4, 1915 much less does it limit the effect of the later Merchant Marine Act of 1920. Counsel can hardly ex-

pect the suggestion that Congress provided this remedy in view of the non-liability of owners under the maritime law (Petitioners' Brief, p. 21) to be taken seriously.

POINT III.

The evidence was clearly sufficient to establish that the second assistant engineer, when he struck plaintiff, was acting in pursuance of his employment.

The question whether the subordinate in committing the particular act complained of was acting within the scope of his employment is ordinarily one of fact. The question in its elements is not unlike the question of proximate cause, *i. e.* as to whether the purpose of the employment, the effort of the superior servant to get the results expected of him was the cause, rather than any private quarrel, of the assault. That this question as to scope of employment was one of fact in this case is clear from the decisions already cited.

All of those cases were cases of assault upon one employee by another. All of them, possibly excepting *Wolfe* vs. *Thomas*, 268 Fed. 464, and *The Vueltabajo*, 163 Fed. 594, in which the assault was committed by the captain, are clearly in point, to the effect that Jackson's act falls within the scope of his employment as an officer of the *Alpha* and an employee of the defendants. We shall not repeat the evidence at length. It suffices to recall that Jackson and Cain were both required to be on duty at the time when the assault actually occurred and that Jackson was in charge. Jackson had just come from the engine room and was attempting to secure a full engine room crew which was lacking because of Cain's absence. Jackson accordingly

went after Cain, hollering to him to come down (pp. 274-5, fols. 820-4). Jackson struck him for the purpose of compelling his attendance, of punishing him for his failure to report on time, and to insure compliance with the ship's routine both on his part and on the part of others of the engine room force. Jackson says he was going to get a wiper to do Cain's watch (p. 298; fol. 893), and there was a wiper sitting up on deck by the engine-room housing (p. 275; fol. 825), yet, when Cain ran from him Jackson followed until he reached Cain in the salon where his wound was being dressed (p. 276; fols. 827-8). From all the facts, the jury were fully justified in drawing the inference that Jackson was attempting to exercise effectually his authority, to perform the functions as an officer for which he was employed, and in particular to get his engine room manned fully for the expected departure of the ship.

The situation shown at bar was certainly as indicative of Jackson's functioning as an employee as were the corresponding facts in the case of *The General Rucker, Memphis & N. Packet Co.* vs. *Hill,* and in all of the State Court decisions which we have cited. These decisions and the quotations from certain of the opinions as well as from the opinion of the Supreme Court of Canada in the case of *Hudson Bay* vs. *Vaillaincourt,* 2 Dom. L. R. N. S. 1008, disclose *that whether a servant is acting within the scope of his employment does depend "not upon the question whether the master authorized the offending employee to use force, but upon the question whether the latter used the force complained of as a means of doing what he was employed to do" (Richard vs. Amoskeag Mfg. Co.,* 8 A. L. R., at 1429). These decisions and expressions of opinion also make clear that the offending act is not taken out of the scope of the

servant's employment either because of its criminal character—it was a crime in every one of the cases cited—or because it was not authorized or ratified by the employer, or because it was accompanied by a display of temper.

Besides the cases which we have cited in actions between master and servant we may resort in determining the question as to scope of employment to cases of third persons assaulted by the servants of the defendant. So far as regards scope of employment and the application of the rule *respondeat superior*, the question is the same whether the person injured by the offender's wrongful act is one of his co-servants or a stranger. It may be that in fact quarrels between persons in the intimacy of common employment are more frequent and present, in a larger proportion of cases, a troublesome question of fact as to whether the employee committing the wrongful act was proceeding in a private quarrel or trying to carry out the functions of his employment. The question of law remains the same. An examination of the cases in which a stranger to the employment has sued the employer in consequence of an assault committed by an employee discloses the statement and application of precisely the same rule as regards what does, and does not fall within the scope of the offender's employment. We call the Court's attention to the following typical cases:

Chesapeake, etc. R. R. Co. vs. *Stojanowski*, 198 Fed. 77 (2nd Circuit);

Phila. & Reading R. Co. vs. *Derby*, 14 Howard, 468, 486;

Steamboat Co. vs. *Brockett*, 121 U. S. 637, 645;

Magar vs. *Hammond*, 183 N. Y. 387, 390-1.

To the same effect are the English cases, *e. g.*:

Bayley vs. *Manchester, etc. R. Co.*, L. R. 8 C. P. 148, 28 L. T. 366;

Dyer vs. *Munday*, 64 L. J. Q. B. 448 (1895), 72 L. T. 448.

In *Steamboat Company* vs. *Brockett* (*supra*), the United States Supreme Court, Mr. Justice Harlan writing, said (121 U. S. at 645):

> "Whether the act of the servant be one of omission or commission, whether negligent or fraudulent, 'if,' as was adjudged in Philadelphia & Reading Railroad *vs.* Derby, 14 How. 468, 486, 'it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment'."

The English cases apply the same test as to the application of the rule *respondeat superior*. In *Dyer* vs. *Munday* (*supra*), the defendant's business was that of selling furniture on "the hire-purchase system". The purchaser of a bedstead from defendant had left it at plaintiff's lodging house as security for arrears of rent. One of defendant's employees going to the lodging house to recover possession of the bedstead assaulted the plaintiff. For the assault he was convicted and sentenced to pay a fine, which he did. In the civil action the Court of Appeals held the defendant employer liable. The Master of the Rolls (Lord Esher) in his opinion said (italics ours):

"The fact that what was done was a criminal offense may be material for the consideration of the jury, but the mere fact that it was a criminal offense does not take the case out of the general rule. *The question is not whether the act was within the authority of the servant.* The authority of the servant is to do what he is told and to do it properly. But the law says that if a man, who is employed to do a thing properly, in the course of his employment exceeds his authority, then the master is liable. The law has always been so laid down" (Opinion, 72 L. T., at p. 449).

Lopez, L. J., said in the same case:

"It is perfectly clear that the question whether acts are, in fact, within the scope of the employment of a servant, is one for the jury, but that the question whether the particular acts can be within the scope of the employment is for the judge. • • • Now the law is, that all acts of a servant done in the course of his employment, and in furtherance of the employment, and in the master's interest, are within the scope of the servant's employment, and that the master is liable for such acts, although they may be contrary to his express orders, and amount to a criminal offense" (*id.*).

All three of the justices constituting the Court of Appeals cited, with approval, the case of *Bayley* vs. *Manchester, etc., R. Co.* (*supra*), in which the railroad was held liable for the act of a porter in wrongfully removing a passenger from his compartment and putting him off the train. The overwhelming weight of authority is in agreement with these cases and with the authorities which we have cited in the previous point.

We call attention to a clear statement of the same rule by the New York Court of Appeals in *Magar* v. *Hammond*, *supra*. In that case the Court said, Chief Judge Cullen writing (183 N. Y. at 390-1):

> "To render the defendant Hammond liable for the willful, reckless or wanton act of Tompkins, the act must have been done by Tompkins in the scope of his employment, and whether it was so done should be submitted as a question of fact to the jury. (Craven *v.* Bloomingdale, 171 N. Y. 439.) If Tompkins, not having the interests or services of his master in mind, and acting maliciously or in order to effect some purpose of his own, shot the plaintiff, then his master, the defendant Hammond, is not liable for the act; but if his act was within the general scope of his employment and done with a view to the furtherance of his master's business, then Hammond is liable whether the act was wilful, wanton or reckless."

CONCLUSION.

There is no basis presented in support of the application which justifies a further review or a longer postponement of the enforcement of the plaintiff's judgment. The application should be denied.

Respectfully submitted,

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